Tenaga Nasional Bhd v Guan Heng Plastic Industries Sdn Bhd

HIGH COURT (JOHOR BAHRU) — NO 23NCVC-129 OF 2011
VERNON ONG J
10 APRIL 2012

Evidence — Witness — Credibility of — Inconsistencies and contradictions in testimonies of plaintiff's technicians — Whether testimonies had evidential value — Burden of proof — Whether proven that installation of meter at defendant's premises was tampered with — Whether plaintiff discharged its burden of proof

Public Utilities — Supply of electricity — Claim for arrears of electricity consumption — Whether electricity meter on defendant's premises had been tampered with — Whether plaintiff suffered loss of revenue arising from tampering of electricity meter — Whether computation of electricity usage flawed

At all material times Tenaga Nasional Bhd ('TNB') had supplied electricity to the defendant's plastic factory. On 21 June 2010, two TNB technicians, who had conducted a routine inspection of the electricity meter at the defendant's factory, had discovered that the installation of the electricity meter on the defendant's premises had been tampered with and as a result the meter had failed to record the actual usage of electricity at the defendant's premises. Using a graph from year 2000 to 2011, TNB had found that the consumption of electricity at the defendant's factory had dropped abruptly from May 2008 to June 2010. Consequently, TNB calculated the back-billing based on the average consumption of 34 days prior to the back-billing start date. TNB then filed the present action against the defendant wherein it claimed that it had suffered a loss of revenue amounting to RM1,656,356.11 arising from the tampering of the electricity meter on the defendant's factory premises. The defendant denied tampering with the meter and claimed that the damage to the meter if any was caused by a foreign worker. Alternatively the defendant argued that even if there was meter tampering, the back-billing should be calculated from 11 March 2009, which was the date of the last routine meter inspection at the defendant's premises and not from May 2008. The defendant also disputed the method of computation adopted by TNB when it calculated the back-billing.

Held, dismissing the claim with costs of RM15,000:

(1) The evidence of the two TNB technicians, who conducted the routine inspection, as to their findings of the alleged tampering of the meter on

A the defendant's premises, was fraught with inconsistencies and contradictions. In effect their testimonies had to be discounted altogether and their findings, as recorded on the Borang Pemeriksaan (exh P2), were unreliable. Hence, the evidential value of exh P2 was in doubt. As the only evidence of the alleged tampering was that of the two TNB technicians, it followed that there was no evidence to prove that the installation of the meter at the defendant's premises was tampered with. In addition there were also discrepancies between Exh P2 and the back billing document (exh P4), which were not explained (see paras 18–19).

(2) Even if the alleged tampering had been proved, exh P4 ignored the fact that TNB had conducted a routine inspection of the defendant's meter on 11 March 2009 and found nothing irregular. Accordingly, the computation in exh P4 was fundamentally flawed and the evidential value of exh P4 was also in doubt (see para 20).

(3) The extensive evidence introduced by the defendant relating to the reasons for the decreasing usage of electricity at the defendant's factory from January 2008 to December 2008, namely the loss of the defendant's core business, was corroborated by the independent evidence of an electrical engineer (see para 21).

(4) On the totality of the evidence TNB had failed to discharge the burden of proof, which was upon it, and its claim against the defendant must necessarily fail (see para 22).

[Bahasa Malaysia summary

Pada setiap masa matan Tenaga Nasional Bhd ('TNB') telah memberi bekalan elektrik kepada kilang plastik defendan. Pada 21 Jun 2010, dua juruteknik TNB, yang telah melakukan pemeriksaan rutin, mendapati bahawa pemasangan meter elektrik di premis defendan telah diusik dan akibat daripada itu meter tersebut gagal merekodkan penggunaan sebenar elektrik di premis defendan. Dengan menggunakan graf dari 2000 hingga 2011, TNB mendapati penggunaan elektrik di premis defendan berkurangan dengan ketara sejak Mei 2008 hingga Jun 2010. Berikutan itu, TNB telah mengira bil-bil terdahulu berdasarkan penggunaan purata 34 hari sebelum tarikh mula bil-bil terdahulu. TNB kemudian telah memfailkan tindakan ini terhadap defendan di mana ia mendakwa bahawa ia telah mengalami kerugian hasil berjumlah RM1,656,356.11 yang timbul daripada pengusikan meter elektrik di premis kilang defendan. Defendan menafikan telah mengusik meter itu dan mendakwa bahawa kerosakan meter jika adapun telah disebabkan oleh pekerja asing. Secara alternatif defendan berhujah bahawa jikapun terdapat pengusikan meter, bil-bil terdahulu itu patut dikira dari 11 Mac 2009, iaitu tarikh pemeriksaan rutin meter terakhir di premis defendan dan bukan dari

bulan Mei 2008. Defendan juga mempertikaikan cara pengiraan yang digunakan oleh TNB apabila ia mengira bil-bil terdahulu tersebut.

Diputuskan, menolak tuntutan dengan kos RM15,000:

(1) Keterangan dua juruteknik TNB, yang telah melakukan pemerikaan rutin, berhubung penemuan mereka tentang pengusikan pembegaan meter di premis defendan, adalah tidak konsisten dan terdapat percanggahan. Akibat itu testimoni-testimoni mereka telah diketepikan sama sekali dan penemuan mereka, sebagaimana yang telah direkodkan atas *borang pemeriksaan* (eksh P2), tidak boleh digunakan. Justeru nilai keterangan eksh P2 adalah diragui. Oleh kerana satu-satunya keterangan tentang pengusikan yang dikatakan itu adalah daripada dua juruteknik TNB tersebut, didapati tiada keterangan untuk membuktikan bahawa pemasangan meter di premis defendan telah diusik. Tambahan pula terdapat juga percanggahan antara eksh P2 dan dokumen bil-bil terdahulu (eksh P4), yang tidak dijelaskan (lihat perenggan 18–19).

(2) Walaupun pengusikan yang dikatakan itu telah dibuktikan, eksh P4 telah mengendahkan fakta bahawa TNB telah melakukan pemeriksaan rutin pada meter defendan pada 11 Mac 2009 dan tidak mendapati apa-apa yang luar biasa. Oleh itu, pengiraan dalam eksh P4 tidak tepat dan nilai keterangan eksh P4 juga diragui (lihat perenggan 20).

(3) Keterangan terperinci yang dikemukakan oleh defendan berkaitan sebab-sebab pengurangan kegunaan elektrik di kilang defendan dari Januari 2008 hingga Disember 2008, terutamanya kerugian perniagaan utama defendan, telah disokong oleh keterangan berasingan seorang jurutera elektrik (lihat perenggan 21).

(4) Berdasarkan keseluruhan keterangan TNB telah gagal melepaskan beban bukti yang terletak padanya dan tuntutannya terhadap defendan patut gagal (lihat perenggan 22).]

Notes

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3029–3086.

Cases referred to

Abrath v The North Eastern Railway Company (1883) 11 QBD 440, CA (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101(1), 102

Izatunlina Jamaludin (Abd Rahim Ali with her) (Shahrizat Rashid & Lee) for the plaintiff.

CM Lai (Albert Koo with him) (Bahari, Choy & Nongchik) for the defendant.

Vernon Ong J:

[1] Tenaga Nasional Bhd's ('TNB') claim is for loss of revenue amounting to RM1,655,356.11 arising from the tampering of the electricity meter on the defendant's factory premises.

BRIEF ACCOUNT OF THE FACTS

[2] TNB supplies electricity to the defendant's plastic factory. On 21 June 2010, TNB personnel carried out a routine inspection on the installation of the electricity meter at the defendant's factory. Arising from the inspection, TNB is claiming the loss of revenue for the period from May 2008 to June 2010.

TNB'S CASE

[3] During the inspection carried out on 21 June 2010, TNB discovered that the installation of the electricity meter had been tampered with and as a result, the meter had failed to record the actual usage of electricity at the defendant's factory. TNB called three witnesses: En Mohd Azlan bin Mohamad Noor a technician ('PW1'), En Suhaimee bin Md Dan a technician ('PW2') and En Ramesh a/l Thangaveloo a manager ('PW3').

DEFENDANT'S DEFENCE

[4] The electricity meters were damaged by a foreign worker on 2 June 2010. The defendant informed the plaintiff to install a new meter. On 21 June 2010, the plaintiff came to the defendant's factory. They conducted an inspection on the installation of the meter and installed a new meter. The defendant was not present when the plaintiff carried out the inspection and installation of the new meter.

[5] The defendant denies tampering with the meter. Since May 2010 the usage of electricity had been reduced by between 60–70% after it had ceased to supply orders from Pan-Creative Sdn Bhd. The defendant have never been given any documents to support the allegation of tampering and the amount claimed by TNB. The defendant called five witnesses: Mr Tee Kok Seng a director ('DW1'), Mr Lim Shaw Huu a production manager ('DW2'), Mr Lim Chin Boo an electrical engineer ('DW3'), Mr Tee Cheng Sea a sales executive ('DW4'), and Ms Sieh Yueh Chyuu an accounts executive ('DW5').

OVERVIEW OF THE EVIDENCE

TNB's evidence

[6] PW1 went to the defendant's factory on 21 June 2010 together with PW2. PW1's role was to take photographs; he produced 14 photographs (exhs P1(A)–(N)) taken by him at the defendant's factory.

[7] PW2 conducted a routine inspection on the installation of meter on 21 June 2010. PW2 said that he carried out the inspection by himself. PW2 asked the defendant's representatives to be present at the inspection. He referred to a photograph taken by PW1 to support his assertion. PW2 discovered that the meter had been tampered with as follows:

(a) the seal bits at the Test Terminal Block ('TTB') were missing;

(b) the TTB slip was not in its original position;

(c) the meters were damaged; and

(d) the pulses were not blinking.

PW2 then informed the defendant's representative who was present of the discovery of the tampering. PW2 then replaced the TTB slip to its original position and change the meters. He recorded his findings in a *Borang Pemeriksaan LPC Voltan Rendah* (exh P2). He also lodged a police report on 23 June 2010 on the tampering of meters at the defendant's factory (exh P3).

[8] PW3 was in charge of monitoring cases of tampering and computing the loss of revenue in such cases. He laid down the method of calculation for computing the amount claimed. He calculated the back billing based on the average consumption of 34 days (from 18 September 2007 to 22 October 2007) prior to the back billing start date (exh. P4). Using a graph from year 2000 to 2011, PW3 said that the consumption of electricity at the defendant's factory had dropped abruptly from May 2008 until June 2010.

The defendant's evidence

[9] According to DW1, on 2 June 2010 a foreign worker ran amok and damaged a factory machine monitor screen and the electricity meter. A police report (exh D17) was lodged on 29 October 2010. Subsequently, the defendant received TNB's notice dated 24 September 2010 claiming for loss of revenue of RM1,818,719.47 for the period between May 2008 and June 2010. On 6 December 2010, the defendant's solicitors wrote to TNB objecting to TNB's allegations and denying the claim. DW1 said that the defendant did not

tamper with the installation of the meter. The damage to the meter was caused by the foreign worker. Further, none of the defendant's representative was present during the inspection by TNB personnel.

[10] DW1's evidence on the damage caused by the foreign worker was corroborated by the production manager DW2. DW2 said none of the defendant's employees were present when the TNB personnel had inspected and changed the meter. Later PW1 and PW2 came to his office and asked him to sign the *borang pemeriksaan* (exh P2). DW2 also denied the alleged tampering of the installation of the meter.

[11] DW3 an electrical engineer testified that according to the *borang pemeriksaan* (exh P2), prior to 2 June 2010, the last routine inspection of the installation of the meter was carried out on 11 March 2009. Since no claim or complaint was taken against the defendant, it means that the meter was in good working order and the recording of the usage was correct. Even if there was tampering, the back-billing should be calculated from 11 March 2009 and not from May 2008. DW3 also said that PW1 and PW2 failed to carry out alternative testing on the installation of the meter. DW3 also disputed the method of computation adopted by PW3; he said that the better method was the 'average mean' method; whereby the whole year's consumption is added up and divided by the number of days of consumption.

[12] DW4 testified about the incident at the factory which led to the monitor screen and meter being damaged and said that he made the police report on the incident. DW5 testified that all the documents produced were prepared in the ordinary course of business and that she had control and access over them.

FINDINGS OF THE COURT

[13] In law, the party who desires the court to give judgment as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof is on that party is twofold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the other party need not adduce any evidence. In this respect it is TNB who must establish its case. If TNB fails to do so, it will not do for TNB to say that the defendant has not established its defence (*Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA); s 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in TNB's favour at the conclusion of the whole case. Even if

TNB established a prima facie case, but at the conclusion of the trial the court found that the position was exactly even, then any preponderance in favour of TNB had ceased to exist. If that happens, then TNB has failed to discharge the burden of proof which is upon it, and TNB must necessarily fail (*Abrath v The North Eastern Railway Company* (1883) 11 QBD 440 (CA)).

[14] In this instance, TNB's claim for loss of revenue is premised on the fact that the installation of the meter at the defendant's factory was tampered with. The tampering was discovered during a routine inspection at the defendant's factory on 21 June 2010.

[15] According to PW1's testimony, he did not take any part in the inspection of the meters. He only took the photographs exhs P1(A)–(N). This appears to be borne out by PW2's signature as the 'pegawai pemeriksa' on the *borang pemeriksaan* exh P2. Under cross-examination, PW1 confirmed his said assertion.

[16] In his evidence-in-chief, PW2 testified that he conducted the inspection and changed the meters. However, under cross-examination, PW2 changed his story. He said that he did not inspect the meter or changed the meter. In answer to a question as to who conducted the inspection, PW2 said that 'En Azlan (PW1) yang buat, saya merekod'. PW2 also agreed to counsel's suggestion that 'En Azlan (PW1) buat catatan dan En Suhaimee rekod. En Azlan (PW1) setelah En Azlan (PW1) buat pemeriksaan, En Suhaimee merekod …' PW2 also said PW1 asked him to sign the *borang pemeriksaan* (exh P2).

[17] At this juncture, it is pertinent to observe that when PW1 was cross-examined on matters pertaining to the findings and results in the *borang pemeriksaan* (exh P2), learned counsel for TNB objected on the ground that PW1 did not have any knowledge about it and that the questions should be directed to PW2. As it turns out, PW2 contradicted PW1 when PW2 said that PW2 did not conduct the inspection.

[18] In consequence of the above, PW1 and PW2's evidence on the findings of the alleged tampering is fraught with inconsistencies and contradictions. The court did not find PW1 and PW2 to be credible and consistent; their evidence was contradictory. In effect, the testimonies of PW1's and PW2's had the effect of cancelling out each other's evidence; in consequence their evidence must be discounted altogether. Consequently, the evidence leading to the findings recorded on exh P2 is unreliable; as the evidential value of exh P2 is also doubtful.

[19] The court further notes that there are discrepancies between the *borang pemeriksaan* (exh P2) and the back-billing document exh P4. According to exh

P2, the tampering were (i) 'Display meter main dan check dipecahkan'; and (ii) 'Sil TTB bahagian bawah diterbalikkan'. In contrast, exh P4 states that the tampering was 'Terdapat 1 x clamp digunakan untuk memintaskan litar arus pendua pada S1 dan S2 serta Fasa kuning dan biru di bawah TTB'. The fact that there was 'memintas litar arus' (by-pass wiring) is a significant finding. However, upon examining exh P2, it is plain that there is no mention of any such finding. In fact under cross-examination, PW2 confirmed that apart from the two items stated in exh P2 above, there was nothing else. This indicates that there was no instance of 'memintas litar arus' as stated in exh P4. How this discrepancy between exhs P2 and P4 came about is not explained. In addition, it is also pertinent to note that PW2 agreed under cross-examination that the fact that the TTB cover was installed upside down had no effect on the meter reading.

[20] Even if the alleged tampering had been proved, the court was not satisfied with the reliability of the computation of back-billing (exh P4) produced by PW3. Firstly, P4's back-billing for the period from May 2008 to June 2010 ignores the fact that on 11 March 2009 TNB conducted a routine inspection and found nothing irregular. There were no complaints as at 11 March 2009, therefore, the back-billing should not have related back to a period prior to 11 March 2009. In fact, PW3 did not explain how this inconsistency can be reconciled or justified. PW3 appears to have overlooked this fact in making his computation. Accordingly the computation in exh P4 is fundamentally flawed. Consequently, the evidential value of exh P4 is also in doubt.

[21] Further, the court also notes the extensive evidence introduced by the defendant relating to the reasons for the decreasing usage of electricity at the defendant's factory between January 2008 to December 2008; due to the loss of the core business of Pan-Creative Sdn Bhd. There was also evidence to show that the consumption of electricity of injection moulding machine was vastly greater than vacuum forming machines which were the defendant's mainstay after the loss of the core business. The defendant's evidence was corroborated by the independent evidence of DW3 the electrical engineer who analysed the data from the manual books. DW3 concluded that the electricity usage for injection moulding machine is 68.9kwh compared with 28kwh for vacuum forming machine. On the whole, the court finds the evidence to be plausible.

CONCLUSION

[22] The allegation of the tampering is the heart of TNB's claim for loss of revenue. As the only evidence of the alleged tampering is that of PW1 and PW2, it follows that there was no evidence to prove that the installation of the meter at the defendant's factory premises was tampered with. On the totality of

the evidence, the court finds that TNB has failed to satisfy the burden of introducing evidence so much so that the court is left in a real state of doubt as to whether TNB's case had been made out. Even if the fact of tampering had been made out, the court is not satisfied with the evidential value of the back-billing exh P4 for the reasons adverted to above. On the whole, TNB's case has not been established on a preponderance in its favour.

[23] For the foregoing reasons, TNB's claim is dismissed with costs of RM15,000.

Claim dismissed with costs of RM15,000.

Reported by Kohila Nesan